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MICHAEL RODAK, JR., CLERK

No. 80-756

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES; AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION,

Petitioners,

vs.

GRAY PANTHERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the invalidation of certain Medicaid regulations which, in direct contravention of the statute, allowed certain states to consider income available to an institutionalized spouse which, in fact, was not available.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-17a, to Petition), which was not yet reported at the time of the filing of the Petition, is now reported at 629 F.2d 180.

STATEMENT OF THE CASE

A significant omission in defendants' Statement is their failure to describe the background of the regulations which are the subject of this case. Until April 13, 1977, deeming regulations did not distinguish between the 209(b) and SSI states. 45 C.F.R. §248.3(b) (Oct. 1, 1976). These regulations tracked the Medicaid statute, 42 U.S.C. §1396a(a)(17), by providing that "only such income and resources as are actually available will be considered and that income and resources will be reasonably evaluated." 45 C.F.R. §248.3(b)(1) (emphasis supplied). This requirement of actual availability implemented the spirit and words of the legislative history, which described the relevant provision as "designed so that the States will not assume the availability

of income which may not, in fact, be available." S.Rep.No. 404, 89th Cong., 1st Sess. (1965), reprinted in [1965] U.S. Code Cong. & Admin. News, 1943, 2018.[1/] The Senate Finance Committee Report also stated that "[n]o income can be imputed to an individual unless actually available." Id., at 2018.

Pursuant to these legislative directives, HHS[2/] developed guidelines in its 1966 Handbook of Public Assistance Administration to ensure that states only counted income which was actually contributed:

> "Income and resources are realistically evaluated and are not assumed to be available from sources from which payments are not in fact received .... Available income and resources are income and resources which

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1/ See also H.R.Rep.No. 213, 89th Cong., 1st Sess. (1965), at 67.

2/ Although many of the events discussed in this brief involved the Department of Health, Education and Welfare ("HEW"), the predecessor to Health and Human Services, see 20 U.S.C. §3508, the term "HHS" is intended to refer to both.

> are 'in hand' or under the control of the individual ...." Supplement D, §D-4230(4) (emphasis supplied).

From these guidelines were developed the regulations discussed above, which demanded that states only count income available in fact.

From all appearances, these regulations and guidelines required states to make reasonable evaluations of income and resources, and did not permit states to presume the availability of income or resources which were not actually available. In practice, however, many states did not follow these requirements, and HHS implicitly accepted this apparent violation of its own regulations.[3/] Thus, states did employ deeming procedures prior to the changes which were made in the regulations.

3/ Defendants' statement that deeming was undertaken "[w]ith the approval of the Secretary of Health, Education and Welfare," Pet., at 2, must be a reference to this de facto acceptance of the procedure. As plaintiff has noted, the pre-1977 regulations and guidelines explicitly precluded states from assuming income available which was not in fact available.

Nearly two years after the SSI statute went into effect on January 1, 1974, HHS proposed regulations which were intended to distinguish between the 209(b) and SSI states. 40 Fed.Reg. 60074-60075 (1975). The final regulations, which went into effect on April 13, 1977, carried out this distinction. 42 Fed.Reg. 2684 et seq. (1977). Pursuant to these regulations, the SSI states had their deeming policies limited by the restrictions on deeming in the SSI statute, 45 C.F.R. §248.3(b)(2).[4/] HHS devoted virtually all of its discussion of these new regulations to those applicable in the SSI states. But the "new"

4/ According to the comments, states had been subject to these SSI rules because of the relationship between SSI and Medicaid since the beginning of the SSI program. 42 Fed.Reg. 2685. HHS had not attempted, however, to enforce these requirements prior to implementation of the new regulations, so that until that time, SSI states, as well as 209(b) states, were evaluated under the same regulations. See, e.g., Burns v. Vowell, 424 F.Supp. 1135 (S.D.Tex.1976); Franssen v. Juras, 406 F.Supp. 1375 (D.Ore. 1975).

regulations directed at the 209(b) states were also significant, since, for the first time, they did not include the "actually available" language. Instead, those states were told simply that they could use any eligibility criteria, subject to the proviso that "consideration of income and resources may not be more restrictive than that included in the State's January 1972 Title XIX plan." 45 C.F.R. §248.3(b)(4). Since what was in a state plan at that time should have reflected the actually available language of the prior regulations and guidelines, these new regulations did not result in a substantive change. If HHS had been enforcing its previous regulations against deeming, those which were later applicable only to the 209(b) states would have also forced states not to deem.

The next rewording of the regulations[5/] occurred with the rewriting and

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5/ In the interim, a redesignation took place which changed the codification from 45 C.F.R. §248.3(b)(4) to 42 C.F.R. §448.3(b)(4). See 42 Fed.Reg. 52827 (1977). The wording was not altered.

renumbering of many Medicaid regulations, effective October 1, 1978. This alteration resulted in the present regulation applicable to the 209(b) states, but the prologue to the revision specifically stated that it created no substantive or policy changes. 43 Fed.Reg. 45176 (1978). As a result, the present regulatory citation, 42 C.F.R. §435.734, which merely restates the previous requirement that states cannot use more extensive rules than those in effect in January, 1972, represents the direct descendant of the old 45 C.F.R. §248.3(b)(1), which, under any rational interpretation, appeared to prohibit deeming altogether.[6/]

6/ See Gray Panthers v. Secretary, Department of Health, Education, and Welfare, 461 F.Supp. 319, 320 n.2 (D.D.C. 1978) (Pet. App. E, at 23a n.2). For simplicity's sake, plaintiff has only discussed the evolution of the regulations applicable to the 209(b) states. Those applicable to the three island jurisdictions underwent a similar metamorphosis in codification and wording, and now appear at 42 C.F.R. §§436.602, .711, .821. But they also derive, with no substantive change, from regulations requiring actual availability. See 45 C.F.R. §248.21(a)(2)

(cont. p.7)

These regulations were invalidated by the district court in this case, with defendants ordered "to promptly propose and publish new regulations which will conform with the statute." Pet. App. F,

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6/ (cont.)

(Oct. 1, 1976). And defendants stipulated that the "new regulations ... have the same effect as the prior regulations ...." 461 F.Supp., at 320 n.2 (Pet. App. E, at 23a n.2). Plaintiff thus disagrees with defendants' contention that a different analysis should apply to these regulations. Pet., at 5-6 n.8. Since both types of jurisdiction are directly subject to the provisions of 42 U.S.C. §1396a(a)(17), and the regulations from both have been developed without policy changes from identical predecessors, the same arguments apply to both sets of regulations. The only difference is that for the 209(b) states, defendants have available an additional argument, that those states' deeming practices are "protected" by 42 U.S.C. §1396a(f). See Pet., at 13-14; infra, at 34-36. For the remainder of this brief, therefore, plaintiff will only discuss the regulations applicable to the 209(b) states. That discussion, except for rebuttal of the argument premised on 42 U.S.C. §1396a(f), is necessarily applicable to the regulations controlling the island jurisdictions as well.

at 32a.[7/] Defendants' response was the issuance of an "HCFA [Health Care Financing Administration] Regional Letter" to the regional offices instructing them to direct the affected jurisdictions "to cease deeming income for any length of time between aged, blind, or disabled Medicaid applicants, residing in institutions, and their spouses." It further states that an "Action Transmittal" would follow immediately, as that "is the most expeditious way to inform States of the necessary action. The Action Transmittal will be policy, effective until revised regulations are published." Three days

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7/ Another federal court issued a similar order the following year. Allen v. Califano, No. C-78-212 (D.Utah, Aug. 23, 1979), appeal pending No. 79-2167 (10th Cir.). Although further proceedings on the appeal in that case have been stayed by the Tenth Circuit, the order of the district court was not stayed. Indeed, on December 10, 1980, the Tenth Circuit denied the government's motion to stay the district court order. That August, 1979 order is still in effect, contrary to defendants' implication. Pet., at 7 n.9.

later the Action Transmittal was sent to the states, and it restated the order of the Regional Letter.

Other than this recognition of the effect of the district court order, defendants did not, until pressured, take any further action. Their required "prompt publication" of proposed regulations, consistent with Gray Panthers and Allen, did not take place until November 21, 1979. 44 Fed.Reg. 66855. Consistent with the district courts' decisions, these regulations would have prevented states from deeming income:

> "This [proposed] regulation permits considering income, in [209(b) states and the island jurisdictions], as available to an individual who is aged, blind or disabled only to the extent that the income is in fact contributed to the individual by his or her spouse when either the individual or his or her spouse is institutionalized." 44 Fed.Reg. 66856 (emphasis supplied).

Although the decision of the Court of Appeals was not announced until July 29, 1980, more than eight months after the proposed regulations appeared, defendants

still had not published the regulations in final form. Indeed, they were never finalized.

Like the district court, the Court of Appeals admonished defendants to promulgate new regulations "without delay." 629 F.2d, at 187 (Pet. App. A, at 13a). In light of defendants' past failures in this regard, plaintiff obtained an order from the district court requiring the publication of proposed new regulations by October 28, and final regulations by December 11. After failing for the third time to obtain a stay,[8/] defendants published proposed regulations on October 30, 1980. 45 Fed.Reg. 71821. The final regulations appeared in the December 15, 1980 issue of the Federal Register. 45 Fed.Reg. 82254 et seq. As required by the Court of Appeals, these regulations detail

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8/ The district court denied defendants' motion for a stay of its publication order on October 23, 1980. The district court and the Court of Appeals had denied motions to stay the original district court orders on March 20, 1979 and May 18, 1979 respectively.

a required methodology for all of the 209(b) states and island jurisdictions to follow.

REASONS FOR NOT GRANTING THE PETITION

1. The alleged conflicts which defendants urge as their primary argument for granting the petition are either non-existent, negligible, or irrelevant. Overwhelming case authority agrees with plaintiff and the courts below that deeming between institutionalized and non-institutionalized spouses is impermissible under the Medicaid statute.

Including the decision below, there are, as defendants indicate, Pet., at 7, four cases involving deeming procedures presently pending before this Court on petitions for certiorari.[9/] While

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9/ Gray Panthers v. Administrator, Health Care Financing Administration, 629 F.2d 180 (D.C.Cir.1980), pet. for cert. pending sub nom. Harris v. Gray Panthers, No. 80-756 (filed Nov. 10, 1980); Norman v. St. Clair, 610 F.2d 1228 (5th Cir. 1980), pet. for cert. pending sub nom. Harris v. Norman, No. 80-498 (filed Sept. 27, 1980); Herweg v. Ray, 619 F.2d 1265 (cont. p. 12)

defendants contend that each of these "is to some extent irreconcilable with the others," id., at 7, the more appropriate evaluation is that the significant differences in the nature of these cases render any irreconcilability in their results irrelevant.

Initially, the Herweg decision[10/] must be recognized as of a different breed than the other three. Iowa, the state whose policies are challenged in Herweg, is not a 209(b) state. The key

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9/ (cont.)

(8th Cir. 1980), pet. for cert. pending No. 80-60 (filed July 14, 1980); Brown v. Stanton, 617 F.2d 1224 (7th Cir. 1980), pet. for cert. pending No. 79-1690 (filed April 25, 1980).

10/ An equally divided Eighth Circuit, en banc, upheld a district court decision, 443 F.Supp. 1315 (S.D.Iowa 1978), allowing Iowa, an SSI state, to continue to deem despite an apparent conflict with controlling HHS regulations which limit the duration of deeming. The Secretary was not a party to that case, but, upon request of that court, filed an amicus brief supporting the plaintiffs' position. This Court has asked the Solicitor General to submit an amicus brief. 101 S.Ct. 66 (1980).

to the solution of Herweg is thus not 42 U.S.C. §1396a(f), but, rather, 42 U.S.C. §1396a(a)(10).. The former section provides for the 209(b) option; it is the exception to the rule. The rule is set out in §1396a(a)(10), which requires states to provide Medicaid coverage automatically to all aged, blind, and disabled who are eligible for Supplemental Security Income (SSI) benefits. See, e.g., Harris v. McRae, -- U.S. --, 100 S.Ct. 2671, 2680 & n.1 (1980); Caldwell v. Blum, 621 F.2d 491, 497 (2d Cir. 1980), pet. for cert. pending No. 79-2034 (filed June 24, 1980); 42 C.F.R. §435.120.[11/] On the basis of this "SSI-Medicaid link", HHS promulgated the regulations which forced the SSI states to limit deeming to

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11/ HHS discussed this relationship in its comments to the regulations which differentiated between the 209(b) and SSI states: "[42 U.S.C. §1396a(a)(10)(A)] requires all State Medicaid programs (except those imposing more restrictive criteria under [42 U.S.C. §1396a(f)]) to cover as eligible for Medicaid those aged, blind and disabled persons receiving SSI benefits." 42 Fed.Reg. 2685.

one or six months, depending on the eligibility status of the two spouses. The regulations challenged in Herweg, now codified at 42 C.F.R. §435.723(c), (d), merely implement this basic relationship between the two programs. They are not at issue in any of the other three cases pending before this Court, nor in cases before other courts.12/

Indeed, although deeming is the source of the dispute in Herweg, the real issue in that case is a larger one: whether 42 U.S.C. §1396a(a)(10) does require that the SSI states use all of the SSI criteria in their Medicaid determinations. In its regulations, and in the amicus brief filed before the Eighth Circuit, HHS has answered that question affirmatively. The resolution of Herweg, thus, will not affect the result in this

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12/ Those regulations were implicitly upheld in the only other challenge to the deeming practices of an SSI state after the "SSI-type" regulations became applicable. Griswold v. Page, CCH Medicare & Medicaid Guide, ¶28,537 (N.D. Fla. 1977).

or any other pending case, or, indeed, in any conceivable case involving the criteria relevant to 209(b) states. The issue in Herweg is the relationship between the SSI program and Medicaid; that is not the issue in this case, or in Brown or Norman. In short, it is inaccurate to characterize Herweg as irreconcilable with these other decisions. Although deeming is nominally the issue of that case as well, it bears no relationship to the other cases.

The other three cases, Gray Panthers, Brown, and Norman, are related to the limited extent that they analyze the propriety of deeming pursuant to 42 U.S.C. §§1396a(a)(17) and 1396a(f). Brown and Norman are challenges to state practices which, HHS claims, are permitted under the statute. Gray Panthers is a direct attack on the federal regulations themselves. Whatever inconsistencies may exist between Brown and Norman, the nature of Gray Panthers, with its nationwide effect, renders those differences unimportant.

The instant case eliminates any problems created by different opinions from different circuits. Since Gray Panthers is directed at the Secretary and requires her to implement policies in all relevant jurisdictions, it automatically resolves any inconsistencies emanating from other circuits. At present, all of the affected jurisdictions are subject to regulations which explicitly detail the limitations on deeming applicable in those jurisdictions. See 45 Fed.Reg. 82254 et seq. (1980). The federal regulations which these replace and which were at issue in Brown and Norman were invalidated over two years ago. There is thus no need for this Court to intervene in the dispute because consistency among the states is guaranteed by the decision of the Court of Appeals below.

Moreover, and significantly, with one unimportant exception, there is no difference of opinion regarding the impropriety of deeming. A review of these three cases demonstrates this point. The Brown decision notes that there are essentially two major aspects of deeming. The

first is the determination of the amount of income which a spouse should contribute. The second is the evaluation of whether -- regardless of how much the state determines is a proper contribution -- that amount can be assumed, or deemed, available without, in fact, an actual contribution being made.

The Seventh and Fifth Circuits are not in conflict on the first point. They agree that a flexible mechanism for determining the appropriate contribution is required under the statute in order to ensure that the economic situation of the family at home is taken into consideration. Brown v. Stanton, supra, 617 F.2d, at 1228; Norman v. St. Clair, supra, 610 F.2d, at 1242. By affirming the invalidation of the regulations which permitted states to employ arbitrary formulas for determining the amount of the contribution, and by ordering the Secretary to develop new regulations which are based on "relevant factors," the Court of Appeals below has also agreed on this point. Indeed, no court has held to the contrary, as they all recognize that the

use of an arbitrary and inflexible formula violates the reasonability provision of the statute. 42 U.S.C. §1396a(a)(17)(C).

The second issue is whether the statute permits assumptions as to the availability of the spouse's contribution. The Brown court determined that the statute forbade a state from merely assuming that a contribution is made; unless the spouse actually contributes, the state cannot include that amount as income to the institutionalized spouse. 617 F.2d, at 1230-1231.. The Fifth Circuit disagreed. 610 F.2d, at 1237.

The plaintiffs in Norman did not petition on that point because, for all practical purposes, the Fifth Circuit's decision is of no significance. First, Mississippi is not deeming between spouses separated by institutionalization. Instead, it is operating pursuant to the decision of the district court in Mississippi, which precludes the state from consideration of income and resources which are not in fact available, CCH Medicare & Medicaid Guide ¶29,677, at 10,138 (S.D.Miss.1979), and pursuant to

the HHS directives, issued after the Gray Panthers district court decision, which forbid a 209(b) state from deeming. Moreover, Mississippi has already decided to become an SSI state, effective July 1, 1981. See Petition for Writ of Certiorari, at 14, filed in Harris v. Norman, supra. In addition, there can be no precedential effect from the Norman decision. None of the other states in the Fifth Circuit have taken the 209(b) option,[13/] so that the Court of Appeals' conclusion will have no application to other states either.

These factors thus reduce the decision in Norman to an irrelevancy. The decision has no practical significance for Mississippi or any other states. The only important factor for Mississippi, thus, is the invalidation of the deeming regulations in Gray Panthers.

Finally, there is no conflict between the Gray Panthers and Brown decisions. The latter forbids a state from including

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13/ See 45 Fed.Reg. 82255 n.*.

a deemed amount in the income of the institutionalized spouse. 617 F.2d, at 1231. The Court of Appeals below interpreted the statute to enforce a similar requirement on all states. Noting that "the absence of a spouse from the home because of institutionalization differs significantly in two respects from the situation of cohabiting spouses which is at the heart of the congressional expectation of support," 629 F.2d, at 185, the Court delineated two basic principles distinguishing the situation of spouses separated by institutionalization from other contexts. Id., at 185-186. The essence of this analysis is that the "policy concerns" which the Secretary previously failed to consider, id., at 186, demand that deeming not be permitted where the cause of the separation is institutionalization and where the non-institutionalized spouse does not actually support the institutionalized spouse.

The Brown decision is more detailed, as it outlines exactly what the state can and cannot do, depending on the actions

of the non-institutionalized spouse. The Gray Panthers court, though, since it was considering the general framework of the regulations which the Secretary was required to promulgate, could not provide that degree of detail. It is evident, though, that both courts saw the key scenario, that of spouses separated by institutionalization, as establishing a special circumstance, for which the usual assumptions about support could not be made.

The regulations which the Secretary ultimately promulgates pursuant to Gray Panthers must therefore forbid deeming between institutionalized and non-institutionalized spouses. This is the policy now followed by Mississippi. It is also the policy required by the other courts which have considered the issue. Indeed, every other court which has evaluated this issue has reached a conclusion similar to that in Gray Panthers or Brown; the Norman decision stands alone. The Fifth Circuit expressly recognized that its decision was in contrast to that of all other courts which had considered

the issue. 610 F.2d, at 1240 n.16. The Seventh Circuit explicitly cited this substantial trend against deeming. 617 F.2d, at 1228-1230. Moreover, other courts besides those noted in Brown and Norman have reached the same conclusion. Rubin v. Creasy, CCH Medicare & Medicaid Guide, ¶29,678 (S.D.Ohio 1979); Foard v. Gibson, CCH Medicare & Medicaid Guide, ¶29,679 (W.D.N.C.1979); Krygier v. Buscaglia, CCH Medicare & Medicaid Guide, §29,761 (W.D.N.Y.1979); Allen v. Califano, supra.

There is thus no conflict of any significance between the circuits. Moreover, since the Petition was filed, the Secretary appears finally to have fully evaluated the policy behind deeming and to have recognized the burdens which it places on individuals. By contrast, in urging this Court to review this case, the Secretary made the conclusory statement that her position on deeming was supported by policy considerations:

> "The regulations applicable in 209(b) jurisdictions thus are based on the Secretary's sound

> analysis of the pertinent statutory provisions and due regard for the practical and equitable administration of a nationwide social welfare program." Pet., at 14.

In short, the Secretary contended that her former deeming policy represented both the most administratively efficient and the fairest approach.

Her most recent pronouncement on these issues, however, suggests a considerable change in position, and an enlightened recognition of the real problems created by deeming. Her discussion of policy considerations in the comments to the regulations issued in response to the Gray Panthers orders provides this more recent insight:

> "The Secretary believes that one primary minimum requirement relevant to determining the extent of permissible deeming between spouses in [209(b)] States when one spouse is institutionalized is to adopt policies that are in the best interest of program beneficiaries." 45 Fed.Reg. 82256.

She then lists the significant problems caused by deeming: loss of eligibility if

the deemed amount is sufficiently large; forced eviction if the deemed amount is not actually contributed; disastrous economic consequences for the non-institutionalized spouse if the contribution is made; and unfair pressure placed on the institutionalized spouse by employing deeming rather than relative responsibility laws. Id., at 82256. Furthermore, the limitations on deeming required by these regulations "advance the statutory goal of simplicity of administration and efficient operation of the Medicaid program." Id., at 82257.

These comments strongly contrast with those made in her Petition in this case and in previous pleadings, such as the Petition in Harris v. Norman, supra. In formal statements to this Court, the Secretary vigorously defends her prior deeming regulations, which permitted the practice unlimited in both amount and duration, as the best method for effecting the policy goals of efficient administration and fair direction of a social program. Yet, when directed by the Court of Appeals to carefully evaluate and analyze these

policies, see 629 F.2d, at 186 (Pet. App. A, at 12a), she suggests that a mechanism which limits deeming in both amount and duration effects the same goals of efficient administration and fair treatment of beneficiaries. Emanating from these decidedly inconsistent positions is a prior failure by HHS to determine precisely what the real policy concerns are and how those policies can most efficiently and fairly be carried out.

The comments to the new regulations appear to demonstrate that the agency has carefully, and finally, considered the pros and cons of deeming. That last remaining "conflict" then, an internal one within the collective thought process of HHS, has now been resolved as well. The Court of Appeals below has thus not only clarified any existing statutory confusion; in recognition of the explicit Congressional directive that it is the Secretary who must prescribe the proper standards, 629 F.2d, at 183 (Pet. App. A, at 6a), it has also forced HHS to confront various arguments and to make conclusive policy determinations. By her December

15, 1980 comments to the new regulations, the Secretary has recognized the significant features of deeming, and has squarely sided with beneficiaries. That conflict is thus also resolved.

2. The Petition, however, also raises the issue of cost. The implication is that a prohibition against deeming would have a significant impact. Defendants suggest this by citing a $16 billion figure for fiscal 1977 for all Medicaid costs. Pet., at 10. They note that the sixteen 209(b) states account for about one-third of the 23 million people who received Medicaid benefits nationwide in fiscal 1977. Id., at 10. From those figures, they conclude that "the amount of assistance that would be paid to such individuals will be significantly enlarged if the income of their spouses must be ignored." Id., at 11.

It is significant, though, that defendants do not cite any particular figure for the increased cost of a deeming prohibition. The reason for this omission, which leaves the intended impression that

tremendous increases in Medicaid costs to both state and federal governments would occur, is that the additional cost is actually relatively small.[14/] Indeed, HHS has itself declined to attach any significance to additional costs occasioned when deeming is not permitted. When the regulations which went into effect in April, 1977 were proposed, SSI states complained that the limitations on deeming would have a significant cost impact. This was their major concern. 42 Fed.Reg. 2685. HHS found this an unpersuasive argument:

> "The added costs of this policy are considered less burdensome for non-institutionalized spouses and parents who in some States now have their incomes 'deemed' available to recipients

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14/ The increased burden for state governments would be less than half of the total cost, as the reimbursement formula guarantees that no state is responsible for more than 50% of the Medicaid bill. 42 U.S.C. §1396b. Indeed, most pay considerably less. See 44 Fed.Reg. 10553 (1979); HHS Action Transmittal No. 80-75 (Oct., 1980).

> indefinitely without any test of actual availability. In addition, only seven per cent of the Medicaid nursing home population have living spouses, many of whom are themselves already receiving assistance and thus have no 'deemable' income." Id., at 2685.

HHS thus viewed the states' complaint as both improper on policy grounds, in light of the harsh consequences of assuming income available that was not available, and unimpressive on economic grounds, in light of the relatively few people affected by it. Moreover, HHS' view of the cost impact was with respect to the limitation on deeming in SSI states, which include twice the number affected by this litigation. Still, despite its previous lack of concern in an apparently more costly situation, HHS now urges this Court, by citing impressive (but irrelevant) figures, to accept this case because of its allegedly substantial fiscal impact.[15/] In fact, the financial

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15/ Furthermore, in the comments to its new regulations, HHS again downplays the significance of the "fiscal implications". 45 Fed.Reg. 82257.

effect will be relatively inconsequential.

3. Defendants also contend that they are correct on the merits of the case. These arguments were fully briefed and considered below, and defendants offer no explanation for their inclusion at this point. Of course, there are instances in which discussion of the merits is relevant. For instance, the Court may accept a case for review where the lower court "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court. That contention would require a discussion of the merits. But defendants do not suggest that any such abnormal deviation has occurred, nor, from any objective viewpoint, could they. As has been previously noted, the decision of the Court of Appeals is consistent with overwhelming case authority on this issue. The Court of Appeals specifically did not usurp the Congressional directive that the Secretary develop appropriate regulations, but, rather, determined that the Secretary had

failed to consider the "relevant factors" and ordered the case remanded to her to develop new regulations after considering those factors. The appellate court did not act precipitously, but with an explicit recognition of the applicable reviewing standard. 629 F.2d, at 183 (Pet. App. A, at 62-72).

While this brief is not the appropriate forum for an extended discussion of the merits, some attention must be focused on the Secretary's repeated contention that 42 U.S.C. §1396a(f) requires the regulations which the Secretary defends: "The regulations merely permit 209(b) states to consider the income of an applicant's spouse to the extent that they would have done so under their 1972 Medicaid plans -- as Congress intended by enacting the 209(b) option." Pet., at 14. In addition, defendants argue that deeming must be permissible in the 209(b) states because it would be inappropriate, under 42 U.S.C. §1396a(f), for those states to have a less restrictive deeming policy than have the SSI states. Id., at 13-14. This analysis, however, ignores

both common sense and the statute's express directives.

First, 42 U.S.C. §1396a(f) does not state that the eligibility conditions which a 209(b) state employs must be more restrictive than those used in SSI states. Rather, it simply says that a state must provide coverage, in a given month, to any statutorily defined aged, blind or disabled individual if that

> "State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972 been in effect in such month ...." 42 U.S.C. §1396a(f) (Pet. App. H, at 36a).

In short, the state cannot apply more restrictive eligibility conditions now than it did then.

Nothing in that provision, however, sets the SSI eligibility conditions as the most liberal standard that a 209(b) state may employ. Indeed, if it did, those states which have used more liberal

standards would be required to change them.[16/] The requirement of 42 U.S.C. §1396a(f) is, quite simply, that states ensure eligibility to those who were eligible in 1972. Caldwell v. Blum, CCH Medicare & Medicaid Guide, ¶30,774, at 9369-9370 (N.D.N.Y.1980), appeal pending (2d Cir.). There are no other restrictions.

Nor does the legislative history cited by defendants, Pet., at 13, support their contentions. Those reports only restate the statute, and indicate that Congress sought to allow states to avoid increases in Medicaid roles brought about by the generally more liberal SSI eligibility conditions. There is no suggestion, however, that Congress simultaneously intended to limit those eligibility conditions which were more liberal than

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16/ For instance, Minnesota, a 209(b) state, would have had to employ the SSI deeming standards, which are more restrictive than those which that state uses. See Gray Panthers, 629 F.2d, at 183 n.7 (Pet. App. A, at 6a n.7).

the SSI rules. That was not a legislative goal, nor can section 1396a(f) possibly be read to create that requirement.17/

Defendants assert that the six-month rule for the SSI states requires deeming in the 209(b) states. But that provision exists solely because of a requirement in the SSI statute, 42 U.S.C. §1382c(b), which had nothing to do with deeming, and was designed only to deter fraudulent separations. See H.R.Rep. No. 92-231, 92d Cong., 2d Sess., 150 (1971); Gray Panthers, 629 F.2d, at 184 (Pet. App. A, at 8a). It is employed in the SSI states because of the SSI-Medicaid link. 42

17/ Furthermore, defendants are blatantly incorrect in suggesting that Congress did not contemplate that some non-SSI recipients in 209(b) states would be eligible for Medicaid. Pet., at 13. By requiring, as part of the 209(b) option, that these states use a "spenddown" procedure which allowed deductions for medical expenses, Congress was ensuring that many individuals who did not meet the SSI criteria would be eligible. See 42 U.S.C. §1396a(f); 42 C.F.R. §435.732(c), (d). There is no required spenddown in the SSI states. 42 U.S.C. §1396a(a)(10)(A).

U.S.C. §1396a(a)(10)(A). But the contention that those requirements support deeming in the 209(b) states has no support. On its face, section 1396a(f) does not implicate the SSI standards.

Furthermore, defendants' contention that any provision used in 1972 is automatically valid has been regularly rejected. The courts have recognized that the mere failure to challenge an illegal state eligibility condition prior to 1972 could not have the effect of forever insulating that rule from judicial scrutiny. Thus, the Fifth Circuit held:

> "[209(b)] cannot be viewed as an all-purpose 'grandfathering' clause which effectively legitimizes any and every provision appearing in a state plan in 1972. We find no indication that in passing 209(b) Congress intended to authorize otherwise improper procedures. In other words, if, in January, 1972, the state's deeming procedure was impermissible under 42 U.S.C. §1396a(a)(17), it cannot now be made acceptable simply because of §209(b)." Norman v. St. Clair, supra, 610 F.2d, at 1235.

The Court below specifically relied on

this analysis and conclusion. 629 F.2d, at 185 (Pet. App. A, at 9a). District courts in New York and Illinois have expressly reached the same conclusion, Caldwell v. Blum, supra, CCH Medicare & Medicaid Guide, ¶30,774, at 9366-9367; Winter v. Trainor, CCH Medicare & Medicaid Guide, ¶28,151 (N.D.Ill.1977). The latter made this common sense observation as to the necessary interpretation of section 1396a(f):

> "Implicit in 42 U.S.C. §1396a(f) is the concept that any January, 1972 standard which the state might elect to return to in January, 1974, was a valid standard .... [U]pon exercising its option under 42 U.S.C. §1396a(f), [Illinois] could only elect to return to a standard which was in compliance with statutory and regulatory requirements." CCH Medicare & Medicaid Guide, ¶28,151, at 10,599.

This recognition that the 209(b) option cannot operate to provide retroactive validation of otherwise invalid provisions is consistent with decisions in similar situations. See, e.g., Houston W.R.O. v. Chapman, 555 F.2d 1219, 1225 (5th Cir. 1977), rev'd on jur. grounds 99 S.Ct.

1905 (1979); Johnson v. White, 528 F.2d 1228, 1236-1237 (2d Cir. 1975); Roselli v. Affleck, 508 F.2d 1277, 1280 (1st Cir. 1974); Metcalf v. Trainor, 472 F.Supp. 576, 587 (N.D.Ill.1979); Illinois W.R.O. v. Trainor, 438 F.Supp. 269, 279 (N.D.Ill. 1977). The past failure to challenge a provision does not insulate it forever from attack.

Defendants' arguments on the merits have been regularly repudiated. The option was solely an effort to allow some states to avoid cost increases which would have been occasioned by requiring SSI recipients in all states to be covered. But neither the legislative history nor the provision itself suggests that the 209(b) option was an "all-purpose grandfathering clause," nor do they establish the SSI eligibility conditions as the most liberal which a state could employ. The 209(b) option had a simple purpose, to give states reasonable flexibility. Beyond that, it made no restrictive changes in the eligibility requirements of the statute.

CONCLUSION

There is no split in the circuits requiring resolution by this Court. The petition for certiorari should therefore be denied.

DATED: December, 1980.

Respectfully submitted,

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